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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 STACEY BUCHHOLTZ,
11 Plaintiff,
12 v.
13 ROGERS BENEFIT GROUP, INC.,
14 Defendant.
15

Civil No. 12-cv-2167-BEN (DHB)

**ORDER RESOLVING JOINT
MOTIONS FOR
DETERMINATION OF
DISCOVERY DISPUTES**

[ECF No. 14]

16 On April 3, 2013, Plaintiff Stacey Buchholtz and Defendant Rogers Benefit Group,
17 Inc. (“RBG”) filed a document entitled “Joint Motions for Determination of Discovery
18 Disputes: 1) Responses to Document Request; 2) Compliance With Subpoena; 3) Responses
19 to Deposition Questions; and 4) Quash Subpoena for Psychological Records.” (ECF No.
20 14.) The parties request the Court’s assistance in resolving several discovery issues that have
21 arisen among them that have not been resolved despite diligent meet and confer efforts.

22 After a thorough review of the parties’ arguments and evidence, the Court issues the
23 following Order to resolve the issues in dispute.

24 **I. PLAINTIFF’S ALLEGATIONS**

25 Plaintiff was employed by RBG as a Regional Sales Manager from February 2008 to
26 August 5, 2011. (Compl., at ¶ 5; ECF No. 1-2.) She was hired at RBG with the promise that
27 she would be promoted to manager of RGB’s San Diego office. (*Id.*) Prior to working at
28 RBG, Plaintiff worked for and was highly compensated by Warner Pacific Insurance

1 Services, Inc. (“Warner Pacific”). (*Id.* at ¶ 6.) In January and February 2008, Dennis
2 Sullivan, manager of RBG’s San Diego office, approached Plaintiff and asked her to end her
3 employment with Warner Pacific and instead work for RBG. (*Id.* at ¶ 7.) In order to induce
4 Plaintiff to join RBG, Sullivan assured Plaintiff, both verbally and in writing, that she would
5 be promoted to the position of manager in 2010. (*Id.* at ¶¶ 12-13.) Sullivan also set forth
6 in writing the level of financial compensation that Plaintiff would receive during the years
7 2011 through 2014 after being promoted to manager in 2010. (*Id.* at ¶ 12.)

8 Sullivan’s representations to Plaintiff were made in order to allow Sullivan and RBG
9 to “avail themselves of Plaintiff’s outstanding reputation, talents, and skills and reap the
10 economic benefits thereof,” including allowing Sullivan and RBG to “take over, and convert
11 to their own control and for their own financial benefit, the broker relationships that Plaintiff
12 had cultivated [while with Warner Pacific] and from which existing broker relationships
13 Plaintiff derived substantial economic benefit.” (*Id.* at ¶¶ 8-9.) However, Sullivan and RBG
14 intentionally failed to disclose that RBG would not elevate Plaintiff to manager, that Sullivan
15 did not intend to retire, and that even if Sullivan did retire Plaintiff would not be promoted
16 to manager. (*Id.* at ¶ 10.)

17 As a result of the verbal and written representations made by Sullivan, Plaintiff
18 ultimately agreed to leave Warner Pacific and begin working with RBG. (*Id.* at ¶ 13.)
19 Plaintiff was also induced to transfer her existing broker relationships from Warner Pacific
20 to RBG. (*Id.*) Plaintiff’s performance for RBG was “exemplary in that [she] exceeded all
21 sales expectations, exceeded all sales records for RBG San Diego, and grossed over \$14.5
22 million in sales each year, 2008 and 2009.” (*Id.* at ¶ 14.)

23 While employed by RBG, Plaintiff earned an annual salary and guaranteed bonus in
24 excess of \$176,549, plus benefits including twenty-one days of paid vacation per year. (*Id.*
25 at ¶ 15.) Plaintiff accrued a total of eighty-four days of vacation while employed with RBG.
26 (*Id.*)

27 The parties initially acted in accordance with the promised expectation that Plaintiff
28 would be promoted to manager, as demonstrated by RBG giving Plaintiff the largest office

1 available, giving her the title of Special Representative (as opposed to other salespeople
 2 referred to as Field Representatives) and Plaintiff assuming managerial duties including
 3 overseeing others in the workplace, instituting policies and methods governing and tracking
 4 vacation time, purchasing office furniture, assuming expenditures in excess of \$13,094.91
 5 and recruiting a salesperson (*i.e.*, Melissa Medve) of her own caliber and talent to replace
 6 her presence on the sales team. (*Id.* at ¶¶ 16-20.) In addition, RBG ordered and authorized
 7 the transfer of each of Plaintiff's twenty-nine broker relationships to Medve "leaving
 8 Plaintiff with just a handful of marginally productive broker relationships." (*Id.* at ¶ 21.)

9 Subsequent to the transfer of Plaintiff's broker relationships to Medve, RBG broke its
 10 promise of promoting Plaintiff to manager, and RBG refused to compensate Plaintiff the
 11 amount promised for the years 2011 through 2014. (*Id.* at ¶¶ 22-23.) RBG also refused to
 12 transfer the broker relationships back to Plaintiff, despite her requests so that she could
 13 continue to have an income. (*Id.* at ¶¶ 24-25.) RBG staff, particularly Sullivan, criticized
 14 Plaintiff's lack of earnings, openly mocked Plaintiff and subjected Plaintiff to humiliation
 15 and demeaning criticism. (*Id.* at ¶ 26.) RBG refused to fully reimburse Plaintiff for the
 16 \$13,094.91 she expended on office furniture and other items. (*Id.* at ¶ 27.)

17 On August 5, 2011, RBG terminated Plaintiff after Sullivan presented her with a
 18 spreadsheet demonstrating that her earnings exceeded her sales, which was the result of RBG
 19 and Sullivan having converted Plaintiff's broker relationships and refusing to promote her
 20 to manager. (*Id.* at ¶ 28.) Since Plaintiff's termination, RBG has failed to compensate
 21 Plaintiff for waiting time penalties or wages earned, including salary, guaranteed bonus and
 22 accrued vacation days. (*Id.* at ¶¶ 29-30.)

23 II. DISCUSSION

24 The parties filed their joint motion requesting the Court's assistance in resolving four
 25 discovery disputes: (1) whether RBG should be compelled to provide supplemental
 26 responses to Plaintiff's Request for Production of Documents Nos. 9-14 and 16-19; (2)
 27 whether the Court should quash Plaintiff's subpoena to Sullivan seeking his financial and
 28 retirement account records; (3) whether Sullivan should be compelled to provide deposition

1 testimony concerning the condition of his financial and retirement accounts; and (4) whether
 2 the Court should quash RBG's subpoena to Plaintiff's psychotherapist seeking Plaintiff's
 3 psychological records.

4 **A. Requests for Production of Documents**

5 The parties represent that there exists "disagreements as to . . . RBG's assertion of
 6 objections and partial noncompliance with Plaintiff's" Requests for Production of
 7 Documents. (ECF No. 14 at 8:9-11.)¹ In conjunction with their joint motion the parties filed
 8 a chart showing the discovery issues in dispute, including the Requests for Production of
 9 Documents. (ECF No. 14-16.) That document contains Plaintiff's requests and RBG's
 10 responses and objections to Request Nos. 9-14 and 16-19. (*Id.* at 1-5.) However, the parties'
 11 joint motion does not include a discussion of the parties' respective positions about these
 12 Requests. Rather, the only discussion about Plaintiff's Requests is Plaintiff's discussion
 13 about Request No. 14 (ECF No. 14 at 9:21-11:10) and RBG's conclusory statement that it
 14 "has produced to Plaintiff the income and expense data for the Carlsbad office and all other
 15 RBG offices for the years 2005 through 2012." (*Id.* at 18:10-12.)

16 Because neither party provided the Court with briefing concerning Request for
 17 Production Nos. 9-13 and 16-19, the Court does not address those Requests and will not, at
 18 this time, order RBG to supplement its responses or produce documents in response to those
 19 Requests. The parties are encouraged to continue to meet and confer in an effort to resolve
 20 these disputes informally taking into account the Court's conclusions herein. If the parties
 21 remain unable to resolve these disputes, they shall file a joint motion for determination of
 22 discovery dispute on or before **May 3, 2013**. The joint motion shall separately address each
 23 of the Requests that remain in dispute.

24 Request No. 14 seeks the following documents: "Copies of any and all records,
 25 communications, or other documents or ESI relating to all monies received by RBG from
 26 any production attributed to RBG's San Diego office for each year during the period January
 27

28 ¹ Page numbers for docketed materials cited in this Order refer to those imprinted
 by the Court's electronic case filing system.

1 1, 2005 through the present.” (ECF No. 14-16 at 2.) RBG responded to Request No. 14 as
 2 follows: “RBG objects to this Request on the grounds that it is irrelevant to the issues in this
 3 lawsuit, is not reasonably calculated to lead to the discovery of admissible evidence, violates
 4 RBG’s right to financial privacy, and it is overbroad and unduly burdensome. RBG also
 5 objects to this Request to the extent that it calls for RBG’s confidential and proprietary
 6 financial information.” (*Id.* at 2-3.)

7 Plaintiff contends that income generated by RBG’s San Diego branch is relevant
 8 because: (1) her alleged promised compensation was based, at least in part, on the San Diego
 9 branch’s income; and (2) RBG’s income is necessary to calculate the value of restitution or
 10 disgorgement of profits based on RBG’s alleged wrongful interference with Plaintiff’s
 11 broker relationships. (ECF No. 14 at 9:21-11:10.)

12 Litigants “may obtain discovery regarding any nonprivileged matter that is relevant
 13 to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1). In addition, “[f]or good cause,
 14 the court may order discovery of any matter relevant to the subject matter involved in the
 15 action. Relevant information need not be admissible at the trial if the discovery appears
 16 reasonably calculated to lead to the discovery of admissible evidence.” *Id.* The relevance
 17 standard is thus commonly recognized as one that is necessarily broad in scope in order “to
 18 encompass any matter that bears on, or that reasonably could lead to other matter that could
 19 bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437
 20 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). However
 21 broadly defined, relevancy is not without “ultimate and necessary boundaries.” *Hickman*,
 22 329 U.S. at 507. Accordingly, district courts have broad discretion to determine relevancy
 23 for discovery purposes. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002).

24 Here, the Court agrees with Plaintiff that the documents sought by Request No. 14 are
 25 relevant to Plaintiff’s claims. RBG’s objection that the request is overbroad and unduly
 26 burdensome are unpersuasive. Request No. 14 specifically seeks documents demonstrating
 27 RBG’s income or “monies received” by the San Diego branch from January 1, 2005 through
 28 the present. The Court finds the requested time period appropriate. The years in which

1 Plaintiff was employed by RBG are clearly relevant, and the several years prior to her
 2 employment with RBG are also relevant in that Plaintiff may seek to compare RBG's income
 3 before and after her broker relationships were transferred to RBG. The time period from
 4 Plaintiff's August 2011 termination to the present is also relevant for the same reason given
 5 that RBG maintains Plaintiff's prior broker relationships. Further, RBG has made no
 6 showing that compliance with this Request is unduly burdensome. In fact, RBG argues that
 7 it has already produced the "income and expense data" for the relevant time period. (ECF
 8 No. 14 at 18:10-12.)

9 With respect to RBG's financial privacy objection, the Court finds that RBG's interest
 10 in maintaining the confidentiality of its financial information can be appropriately protected
 11 by the Protective Order that has been entered in this action. (*See* ECF No. 6.)

12 Accordingly, RBG's objections to Request for Production No. 14 are **OVERRULED**
 13 and Plaintiff's request that RBG be compelled to produce documents in response to this
 14 Request is **GRANTED**. To the extent it has not already done so, RBG shall produce to
 15 Plaintiff all documents responsive to Request for Production No. 14 on or before **May 3,**
 16 **2013**.

17 **B. Subpoena to Sullivan**

18 Plaintiff seeks an order compelling Sullivan, a non-party to this action, to comply with
 19 a subpoena requiring the production of documents concerning Sullivan's financial and
 20 retirement account information. (ECF No. 14 at 11:11-12:3; ECF No. 14-6.)² Plaintiff

21
 22 ² Plaintiff's subpoena to Sullivan demands production of the following:

23 1) All document and writings (within the meaning of Federal Rules of Evidence
 24 1001) and Electronically Stored Information (within the meaning of []Federal
 25 Rule of Civil Procedure 34(a)(1)(A)) relating to your total financial condition
 26 for each month during the period January 1, 2007 through the present, including
 but not limited to all assets, liabilities, retirement savings, and all other
 documents, data, or things that materially affected your total financial condition
 during that period, or for any part of it without limitation.

27 2) All documents and writings (within the meaning of Federal Rules of
 28 Evidence 1001) and Electronically Stored Information (within the meaning of
 []Federal Rule of Civil Procedure 34(a)(1)(A)) relating to your retirement
 planning, retirement savings, or communications relating to any intention or

1 contends this information is relevant to Sullivan's intent at the time he induced Plaintiff to
 2 join RBG in 2008, specifically whether Sullivan intended to retire in 2010 and whether his
 3 personal financial situation was adequate at that time to support a 2010 retirement. (ECF No.
 4 14 at 11:11-12:3.) Plaintiff disputes Sullivan's position that the documents constitute private
 5 financial information that should not be disclosed. (*Id.* at 12:4-19.) Plaintiff contends there
 6 is a compelling need for the production of these records because there is no alternative
 7 manner of discovering information regarding Sullivan's retirement plans, financial status and
 8 motives for making certain promises to induce Plaintiff to join RBG. (*Id.*)

9 RBG and Sullivan³ contend that Plaintiff's subpoena to Sullivan should be quashed
 10 because it invades Sullivan's privacy by requiring disclosure of personal income and
 11 retirement planning information. (*Id.* at 18:10-18, 20:18-23:20.) RBG and Sullivan further
 12 contend that the requested documents are not relevant to this litigation or reasonably
 13 calculated to lead to the discovery of admissible evidence. (*Id.*)

14 The Court agrees with Plaintiff that the records sought by her subpoena to Plaintiff are
 15 relevant or, at a minimum, reasonably calculated to lead to the discovery of admissible
 16 evidence. However, relevancy alone is not sufficient when disclosure of the subpoenaed
 17 documents would invade a non-party's privacy. The California Supreme Court has
 18 recognized that California's constitutional right of privacy (*see* CAL. CONST., art. I, § 1)
 19 "extends to one's confidential financial affairs as well as to the details of one's personal
 20 life." *Valley Bank of Nev. v. Superior Court*, 15 Cal. 3d 652, 656 (Cal. 1975). However,
 21 "[t]he constitutional right of privacy does not provide absolute protection against disclosure
 22 of personal information; rather it must be balanced against the countervailing public interests
 23 in disclosure." *Hooser v. Superior Court*, 84 Cal. App. 4th 997, 1004 (Cal. Ct. App. 2000)
 24 (citing *Vinson v. Superior Court*, 43 Cal. 3d 833, 842 (Cal. 1987)). "In determining whether

25 consideration of retirement during the period January 1, 2005 through
 26 December 31, 2010.

27 (ECF No. 14-6 at 4.)

28 ³ Counsel for RBG also represent non-party Sullivan in connection with his
 objections to Plaintiff's subpoena.

1 disclosure is required, the court must indulge in a ‘careful balancing’ of the right of a civil
2 litigant to discover relevant facts, on the one hand, and the right of the third parties to
3 maintain reasonable privacy regarding their sensitive personal affairs, on the other.” *Id.*
4 (citing *Schnabel v. Superior Court*, 5 Cal. 4th 704, 712 (Cal. 1993)). “The court must
5 consider the purpose of the information sought, the effect that disclosure will have on the
6 affected persons and parties, the nature of the objections urged by the party resisting
7 disclosure and availability of alternative, less intrusive means for obtaining the requested
8 information.” *Id.* (citing *Valley Bank*, 15 Cal. 3d at 657-58). “Based on an application of
9 these facts, the more sensitive the nature of the personal information that is sought to be
10 discovered, the more substantial the showing of the need for the discovery that will be
11 required before disclosure will be permitted.” *Id.* (citing *Johnson v. Superior Court*, 80 Cal.
12 App. 4th 1050, 1070 (Cal. Ct. App. 2000); *Hinshaw, Winkler, Draa, Marsh & Still v.*
13 *Superior Court*, 51 Cal. App. 4th 233, 237 (Cal. Ct. App. 1996)).

14 In the instant case, the Court finds that records disclosing Sullivan’s financial
15 condition and retirement planning and accounts are protected under the California
16 Constitution’s right to privacy. However, documents or communications that simply
17 evidence Sullivan’s intent to retire (without disclosing his financial condition or account
18 information) are not. For example, Sullivan’s banking and retirement account statements are
19 protected, but a hypothetical correspondence to a superior at RBG indicting his intent to
20 retire would not be.

21 The Court further finds that Sullivan’s right to keep his financial and retirement
22 account information private outweighs Plaintiff’s need for the information. The Court
23 believes that, although relevant, the likelihood that disclosure of Sullivan’s financial and
24 retirement account information would lead to admissible evidence is remote. Indeed, any
25 claim by Plaintiff that Sullivan’s financial status was not adequate to retire in 2010 is
26 speculative, particularly because the amount of resources necessary to support retirement
27 varies widely from person to person. Accordingly, because disclosure of Sullivan’s financial
28 and retirement account information would invade his right to privacy under the California

1 Constitution, and because such information is sought to pursue a speculative argument, the
 2 Court believes that Sullivan's interest in maintaining the privacy of these records outweighs
 3 Plaintiff's need for the records.

4 Moreover, Plaintiff is not left without alternative, less intrusive means to inquire into
 5 Sullivan's intent regarding whether he planned to retire in 2010. As noted above, Sullivan
 6 is not entitled to withhold documents or communications relating to his plans or intent to
 7 retire, if they exist, although any portions of those documents also containing financial
 8 account information may be redacted. Further, Plaintiff has already questioned Sullivan
 9 regarding his plans or intent to retire. (*See, e.g.*, ECF No. 14-11 at 10-12.) The fact that
 10 Sullivan's testimony did not support Plaintiff's allegations in this case does not justify
 11 Plaintiff's attempt to delve into Sullivan's personal financial information. Finally, Plaintiff
 12 is not precluded from seeking testimony from other witnesses concerning Sullivan's alleged
 13 intent to retire in 2010 and his alleged representations to Plaintiff of that intent.

14 Based on the above discussion, and pursuant to Federal Rule of Civil Procedure
 15 45(c)(3)(A)(iii)⁴, the Court **MODIFIES** Plaintiff's subpoena in that Sullivan is only required
 16 to produce documents and electronically stored information evidencing his intent to retire,
 17 if such documents exist and have not already been produced. To the extent such documents
 18 also disclose Sullivan's financial condition or account information, such information may
 19 be redacted prior to production. Sullivan shall produce responsive documents on or before
 20 **May 3, 2013.**

21 **C. Sullivan's Deposition Testimony**

22 Plaintiff also seeks an order compelling Sullivan to respond to deposition questions
 23 concerning his financial and retirement information. Specifically, Plaintiff "seeks an order
 24 requiring Mr. Sullivan to provide testimony as to his own retirement information and as to
 25 RBG's financial information without limitation." (ECF No. 14 at 13:1-3.) However, for the
 26 reasons stated above, Plaintiff's motion to compel further deposition testimony from Sullivan

27
 28 ⁴ Rule 45(c)(3)(A)(iii) provides that "[o]n timely motion, the . . . court *must* quash
 or modify a subpoena that . . . (iii) requires disclosure of privileged or other protected
 matter, if no exception or waiver applies." (Emphasis added.)

1 is **DENIED**.

2 **D. Subpoena to Psychotherapist**

3 Finally, Plaintiff seeks to quash RBG's subpoena to her psychotherapist, Dr. Keith
4 Auerbach. The subpoena seeks production of Dr. Auerbach's records related to Plaintiff's
5 consultations with Dr. Auerbach and any drugs, therapies or treatments he administered to
6 Plaintiff, documents demonstrating Plaintiff's psychiatric history, Dr. Auerbach's
7 observation notes and any documents reflecting communications Dr. Auerbach had with
8 Plaintiff or with a third party about Plaintiff. (ECF No. 14-9 at 5:21-6:5.)

9 **1. Parties' Positions**

10 Plaintiff contends that RBG's subpoena to Dr. Auerbach should be quashed because
11 (1) the psychotherapist-patient privilege protects against disclosure of psychological records;
12 (2) the subpoena is overbroad; (3) the records sought are not directly relevant inasmuch as
13 Plaintiff has withdrawn her claim for emotional distress⁵ damages; and (4) RBG cannot
14 demonstrate a compelling public need for the disclosure of the records that outweighs
15 Plaintiff's right to privacy. (ECF No. 14 at 13:4-16:28.) Plaintiff also argues that in the
16 event the Court is not inclined to quash the subpoena, the Court should review her
17 psychological records *in camera* prior to ordering disclosure. (*Id.* at 17:18-18:6.)

18 RBG contends that although Plaintiff has withdrawn her claim for emotional distress
19 damages, RBG is nevertheless entitled to discover Dr. Auerbach's records because they are
20 relevant in that they will reflect whether Plaintiff "was complaining [to Dr. Auerbach] at the
21 time about not being made manager, not being paid what she was allegedly promised, not
22 'getting her brokers back,' and whether she left RBG voluntarily or involuntarily." (*Id.* at
23

24 ⁵ Plaintiff also argues that the subpoena to Dr. Auerbach should be quashed
25 because the parties had previously agreed in writing that Plaintiff would only assert
26 "garden variety" emotional distress claims in exchange for RBG agreeing not to require
27 Plaintiff to submit to a medical or mental examination. (ECF No. 14 at 17:1-17.) RBG
28 contends that this agreement did not amount to RBG waiving its right to conduct other
discovery into Plaintiff's psychological records. (*Id.* at 26:17-25.) However, both parties
now agree that Plaintiff has affirmatively withdrawn her claim for emotional distress
damages. (*Id.* at 7:8.) Thus, the Court finds the parties' prior agreement regarding
"garden variety" emotional distress claims to be irrelevant to determining whether the
psychotherapist-patient privilege applies.

23:27-24:6.)

2. Analysis

As recognized by the California Supreme Court, California⁶ has enacted “a broad, protective psychotherapist-patient privilege” to promote “an environment of confidentiality of treatment [that] is vitally important to the successful operation of psychotherapy.” *In re Lifschutz*, 2 Cal. 3d 415, 422 (Cal. 1970).⁷ The psychotherapist-patient privilege provides that a “patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist.” CAL. EVID. CODE § 1014. “[A] patient’s interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage.” *Lifschutz*, 2 Cal. 3d at 431. Indeed, “the confidentiality of the psychotherapeutic session falls within one” of the “zones of privacy” guaranteed by the Bill of Rights. *Id.* at 431-32 (quoting *Griswold v. Conn.*, 381 U.S. 479, 484 (1965)).

However, “[t]here is no privilege . . . as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by . . . [t]he patient.” CAL. EVID. CODE § 1016(a). Moreover, the psychotherapist-patient privilege can also be waived by a patient who, “without coercion, has disclosed a significant part of the [privileged] communication or has consented to such disclosure made by anyone.” CAL. EVID. CODE § 912.

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⁶ As Plaintiff correctly recognizes (ECF No. 14 at 9:18-20), claims of privilege in this diversity action are governed by California privilege laws. *See* FED. R. EVID. 501 (“[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”); *Star Editorial, Inc. v. Dist. Court*, 7 F.3d 856, 859 (9th Cir. 1993).

⁷ As recognized by the Supreme Court, “all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege.” *Jaffe v. Redmond*, 518 U.S. 1, 12 (1996). In addition, the privilege is recognized under federal law. *Id.* at 15 (holding “that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”).

1 As stated above, California Evidence Code § 1016(a) sets forth a “patient-litigant
2 exception” to the psychotherapist-patient privilege.

3 The patient-litigant exception . . . allows only a limited inquiry into the
4 confidences of the psychotherapist-patient relationship, compelling disclosure
5 of only those matters directly relevant to the nature of the specific “emotional
6 or mental” condition which the patient has voluntarily disclosed and tendered
7 in his pleadings or in answer to discovery inquiries. Furthermore, even when
8 confidential information falls within this exception, trial courts, because of the
9 intimate and potentially embarrassing nature of such communications, may
10 utilize the protective measures at their disposal to avoid unwarranted intrusions
11 into the confidences of the relationship.

12 *Lifschutz*, 2 Cal. 3d at 431. “[S]ince the exception compels disclosure only in cases in which
13 the patient’s own action initiates the exposure, ‘intrusion’ into a patient’s privacy remains
14 essentially under the patient’s control.” *Id.* at 433. “In interpreting this exception [courts
15 should be] mindful of the justifiable expectations of confidentiality that most individuals
16 seeking psychotherapeutic treatment harbor.” *Id.* at 431. If the patient-litigant exception is
17 given too

18 broad an effect . . . it might effectively deter many psychotherapeutic patients
19 from instituting any general claim for mental suffering and damage out of fear
20 of opening up all past communications to discovery. This result would clearly
21 be an intolerable and overbroad intrusion into the patient’s privacy, not
22 sufficiently limited to the legitimate state interest embodied in the provision and
23 would create an opportunity for harassment and blackmail.

24 *Id.* at 435. Moreover,

25 [i]n light of these considerations, the “automatic” waiver or privilege
26 contemplated by section 1016 must be construed not as a complete waiver of
27 the privilege but only as a limited waiver concomitant with the purposes of the
28 exception. Under section 1016 disclosure can be compelled only with respect
to *those mental conditions* the patient-litigant has “[disclosed] . . . by bringing
an action in which *they* are in issue.

29 *Id.* (quoting *City & Cnty. of San Francisco v. Superior Court*, 37 Cal. 2d 227, 232 (Cal.
30 1951)).

31 [C]ommunications which are not directly relevant to those specific conditions
32 do not fall within the terms of section 1016’s exception and therefore remain
33 privileged. Disclosure cannot be compelled with respect to other aspects of the
34 patient-litigant’s personality even though they may, in some sense, be ‘relevant’
35 to the substantive issues of litigation. The patient thus is not obligated to
36 sacrifice all privacy to seek redress for a specific mental or emotional injury;
37 the scope of the inquiry permitted depends upon the nature of the injuries which

1 the patient-litigant himself has brought before the court.
2 *Id.* at 435; *see also Roberts v. Superior Court*, 9 Cal. 3d 330, 339 (Cal. 1973) (“[W]here
3 there is no specific mental condition of the patient at issue, and discovery of the privileged
4 communications is sought merely upon speculation that there may be a ‘connection’ between
5 the patient’s past psychiatric treatment and some ‘mental component’ of his present injury,
6 those communications should remain protected by the [psychotherapist-patient] privilege.”).

7 Finally, “[e]ven when the confidential communication is directly relevant to a mental
8 condition tendered by the patient, and is therefore not privileged, the codes provide a variety
9 of protections that remain available to aid in safeguarding the privacy of the patient.”
10 *Lifschutz*, 2 Cal. 3d at 437. For example, “the patient . . . may apply to the trial court for a
11 protective order to limit the scope of the inquiry or to regulate the procedure of the inquiry
12 so as to best preserve the rights of the patient.” *Id.* “[I]n general, the statutory
13 psychotherapist-patient privilege ‘is to be liberally construed in favor of the patient.’”
14 *Lifschutz*, 2 Cal. 3d at 437 (quoting *Newell v. Newell*, 146 Cal. App. 2d 166, 177 (Cal. Ct.
15 App. 1956)).

16 Here, any confidential communications between Dr. Auerbach and Plaintiff clearly
17 fall within the ambit of California’s psychotherapist-patient privilege. The question before
18 the Court is whether the patient-litigant exception applies. Whether Plaintiff has waived the
19 privilege is complicated by the fact that she initially sought to recover for emotional distress
20 damages. The Court has found no prior case addressing a situation analogous to the one
21 presented here, where initial emotional distress claims have been affirmatively withdrawn.
22 However, in recognition of the policy considerations supporting the privilege, including the
23 general recognition that the privilege should be applied liberally in favor of the patient, the
24 Court finds that because Plaintiff has affirmatively withdrawn her intent to pursue her
25 emotional distress claims there is presently no waiver of the privilege. Indeed, “there is no
26 specific mental condition of the patient at issue.” *Roberts*, 9 Cal. 3d at 339.

27 RBG’s argument that the communications between Dr. Auerbach and Plaintiff are
28 relevant is unpersuasive. Clearly, such communications would be relevant to the extent they

1 encompassed discussions about Plaintiff not being made manager, her employment with and
 2 salary from RBG and the reasons why she was no longer employed by RBG. However,
 3 relevancy alone is insufficient when a privilege applies. To hold that a privileged
 4 confidential communication should be disclosed in discovery simply because it is relevant
 5 to the issues in dispute would essentially ameliorate the psychotherapist-patient privilege.⁸

6 The Court further concludes that any documents that RBG seeks from Dr. Auerbach
 7 beyond confidential communications (*e.g.*, consultation notes, treatment information and
 8 communications with third parties about Plaintiff) are likely no longer relevant in this case
 9 and should not be produced. To the extent such other documents are relevant in that they go
 10 beyond Plaintiff's mental condition by disclosing Plaintiff's statements about her work with
 11 RBG, the Court concludes that such documents should not be produced in order to protect
 12 Plaintiff from "annoyance, embarrassment, [and] oppression." FED. R. CIV. P. 26(c)(1).

13 Accordingly, Plaintiff's motion to quash RBG's subpoena to Dr. Auerbach is
 14 **GRANTED**.

15 **III. CONCLUSION**

16 For the reasons discussed above, IT IS HEREBY ORDERED:

- 17 1. The parties shall file a joint motion for determination of discovery dispute
 18 concerning any remaining disputes regarding Plaintiff's Request for Production
 19 of Documents Nos. 9-13 and 16-19 shall be filed on or before **May 3, 2013**.
- 20 2. RBG's objections to Plaintiff's Request for Production of Documents No. 14
 21 are **OVERRULED** and Plaintiff's request that RBG be compelled to produce
 22 documents in response to this Request is **GRANTED**.

23
 24 ⁸ A more compelling argument that RBG does not make is that because Plaintiff
 25 initially placed her mental condition at issue by asserting claims for emotional distress
 26 damages Plaintiff waived the privilege and that her subsequent withdrawal of the
 27 emotional distress claims does not revive the privilege. While there is some merit to this
 28 argument, the Court believes that in the instant case it would be inappropriate to find that
 a waiver of the privilege cannot be revived, especially in light of the fact that the
 confidential communications have not been disclosed but have remained confidential.
 Further, to hold otherwise could create problems when the initial emotional distress
 allegation is contained only in a complaint prepared by counsel, and a particular plaintiff
 may not understand at the outset of the litigation the effect that such a claim might later
 have on confidential psychiatric communications.

DATED: April 18, 2013